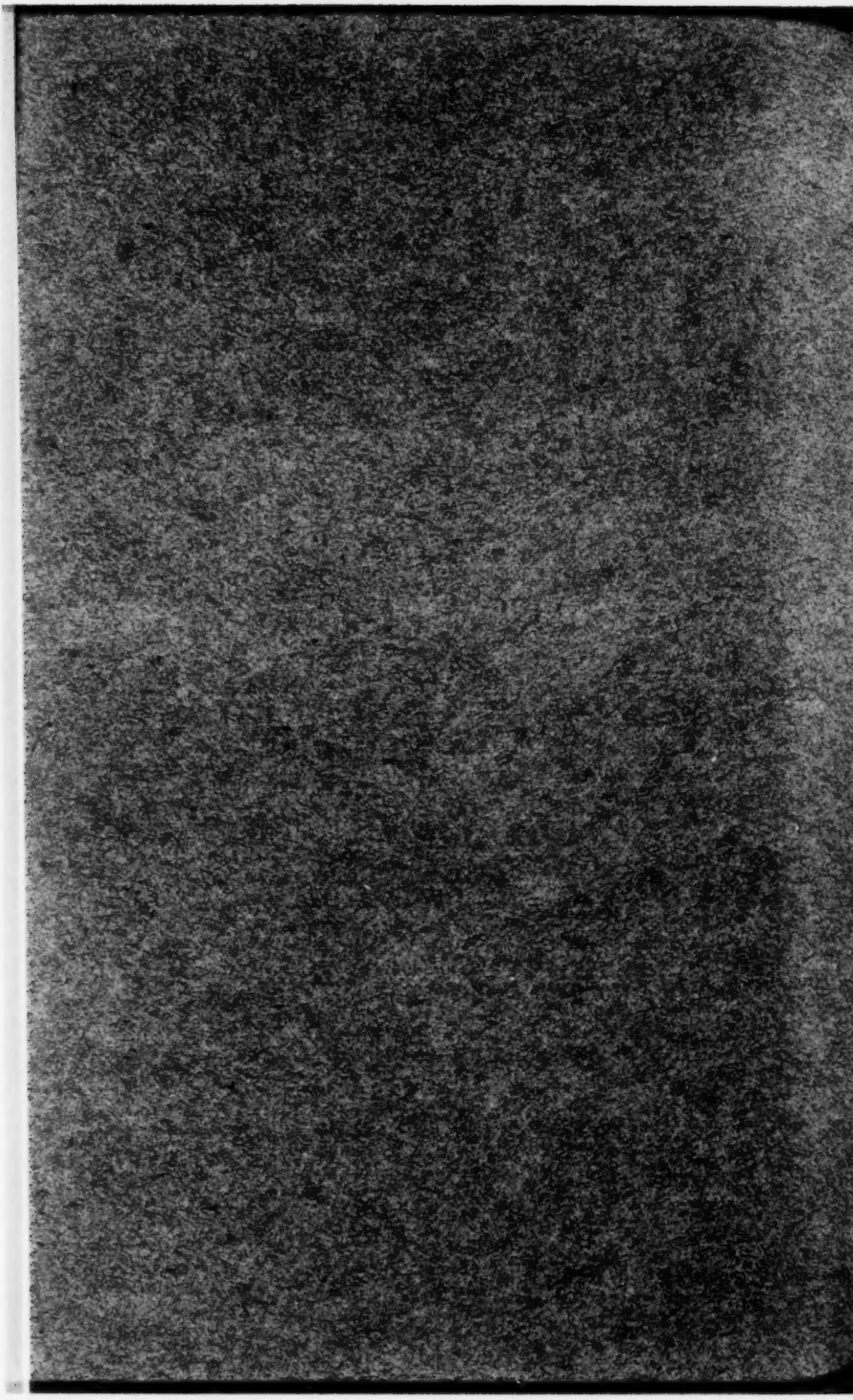

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 212

FRED BARNETT AND EDNA M. BARNETT, PETITIONERS

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINION BELOW

The District Court made findings of fact and conclusions of law (R. 67–97) but did not write an opinion. The opinion of the Circuit Court of Appeals (R. 122–123) is reported in 118 F. (2d) 190.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 5, 1941 (R. 124). The petition for a rehearing was filed on February 19, 1941 (R. 124), and was denied on March 27, 1941

(R. 137). The petition for a writ of certiorari was filed on June 26, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner gave a note and mortgage to a foreign corporation not authorized to do business in the state. A suit in the state court brought by this corporation, for which was substituted a successor foreign corporation, was voluntarily dismissed, after an interlocutory decision on appeal that the mortgagee's disqualification could be pled in bar. A suit by the same successor in the federal court was also voluntarily dismissed. The claim was acquired by respondent which brought suit in the federal court. The questions are:

1. Whether under state law the contract is void, or is enforceable in the federal courts.

2. Whether the state court decision governs this action as "the law of the case."

3. Whether the two earlier dismissals, each prior to the effective date of the Federal Rules of Civil Procedure, bar this suit under Rule 41 (a) (1), which was also brought prior to the effective date of the Rules.

STATUTES INVOLVED

The applicable portions of the Indiana Foreign Corporation Act of 1907 are set forth in the Appendix, *infra,* pp. 12–13.

STATEMENT

A note and mortgage signed by petitioners (R. 71–84) were pledged to respondent in June 1932, by Central Republic Bank and Trust Company (R. 93–94), an Illinois corporation, successor by consolidation in 1931 to Chicago Trust Company, an Illinois corporation (R. 67).

Chicago Trust Company had taken the note and mortgage from petitioners in consideration of a loan made to them at its office in Hammond, Indiana (R. 68–70), through which it made other mortgage loans, both before and after the present loan was made (R. 70–71). Neither Chicago Trust Company, nor Central Republic Bank and Trust Company, at any time complied with the Indiana foreign corporation laws (R. 68).

In 1930, upon default, a suit to foreclose the mortgage was filed in the state court in Indiana by Chicago Trust Company and Willard F. Hopkins, as Trustees under the mortgage; subsequently Central Republic Bank and Trust Company and Arthur J. Baer, as Successor Trustees under the mortgage, were substituted and filed a supplemental complaint (R. 85–88). The defendants filed an answer, alleging that the note was void because the Chicago Trust Company was not authorized to do business in Indiana. The trial court struck the answer, on a motion alleging that it was a matter in abatement and not a plea in bar. The Indiana Appellate Court reversed. *Barnett* v.

Central Republic Bank and Trust Co., 100 Ind. App. 495 (R. 88–91). After remand, on November 30, 1937, the suit in the state court was voluntarily dismissed by the complainants (R. 91).

Central Republic Bank and Trust Company and another, as trustees, on March 14, 1932, had filed in the District Court a bill in equity to foreclose the same note and mortgage. On October 21, 1932, that suit was also voluntarily dismissed by the complainants (R. 92).

In November 1932, the name of Central Republic Bank and Trust Company was changed to Central Republic Trust Company. In November 1934, a receiver was appointed for Central Republic Trust Company (R. 67–68).

On January 20, 1938, the Reconstruction Finance Corporation, as pledgee, filed the present suit in the District Court to foreclose the mortgage and to recover a personal judgment upon the note (R. 3–9). After trial, the District Court entered a decree that respondent have and take nothing by or through its complaint (R. 98–102). The Circuit Court of Appeals reversed and remanded with instructions to enter a decree in favor of respondent (R. 122–124).

ARGUMENT

1. Petitioners complain (Pet. 13, 20–28) that the court below misread or ignored the Indiana decisions construing the Indiana Foreign Corpora-

tion Act of 1907 (2 Burns Annotated Indiana Statutes, 1926 §§ 4909–4922). The court decided this case on the authority of its decision in *Metropolitan Life Ins. Co.* v. *Kane,* 117 F. (2d) 398.[1] The court in that case, relying upon *Peter & Burghard Stone Co.* v. *Carper,* 96 Ind. App. 554 (1933), and *Selph* v. *Illinois Pipe Line Co.,* 206 Ind. 490 (1934), held that Section 9 of the Indiana Foreign Corporation Act of 1907 (2 Burns Annotated Indiana Statutes, 1926, § 4918) did not render void and unenforceable in the federal courts a note and mortgage taken by Chicago Trust Company while doing business in Indiana without compliance with that Act, but merely suspended the right to maintain an action in the Indiana courts until compliance.

This holding seems plainly correct. Section 9 of the Indiana Foreign Corporation Act provides:

> * * * if, after this act shall take effect, any foreign corporation shall fail to comply herewith, no suit may be maintained, either at law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any court in this state.

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[1] That suit involved a note and mortgage given to Chicago Trust Company under substantially the same circumstances as occurred in the present case and differs from this case only in that Metropolitan Life Insurance Company purchased its note and mortgage from Chicago Trust Company before maturity, a circumstance which the Circuit Court of Appeals regarded as immaterial to its decision (R. 123).

In the *Carper* case, the Indiana Appellate Court, after an extensive review of the Indiana decisions, held that a contract executed in Indiana by a foreign corporation doing business there without complying with the statute, but which had complied before it filed suit, was not void, and that the fact of non-compliance merely suspended the right of the foreign corporation to maintain an action in the Indiana courts until it had complied with the statute. The court said, at page 572:

> Such contracts are not void, but remain valid and enforceable by suit in the federal courts or in the courts of any other jurisdiction though there has been no attempt to comply with the statute.

The *Selph* case presented similar facts, except that the foreign corporation was a defendant. The Supreme Court of Indiana approved the *Carper* rule. It said (pp. 492–493):

> In the *Peter & Burghard Stone Co.* case the Court held that although a foreign corporation enters into a contract before a compliance with the statute this fact does not render the contract void, and if, after the execution of the contract, but before suit, the corporation complies with the statute then an action may be maintained by the corporation upon the contract. In this case all of the cases in this state upon the question at issue were collected and considered as well as cases from many other jurisdic-

tions. The case is well considered and reasoned and we do not consider it necessary to dwell further upon the law as decided in that case.

Petitioners rely (Pet. 21–22) upon *Swing* v. *Toner,* 178 Ind. 102 (1912). But the *Swing* case did not involve the Foreign Corporation Act of 1907. The foreign corporation in that case was a mutual fire-insurance company which, by virtue of Section 1 of the Act of 1905, was subject to the provisions of the Indiana Foreign Insurance Company Act of 1877, as amended (2 Burns Annotated Indiana Statutes, 1908, §§ 4663, 4790–4811), which contemplated the doing of business by agents. Not only did the *Swing* case arise under a different statute, but the contention of the plaintiff in that case was that, since the Act did not make the contract void but only suspended the right to enforce the contract until compliance, the fact of noncompliance constituted only matter in abatement which was waived by failure to plead it as such before the general denial and other matters in bar. Only this issue was decided; the court expressly refused to determine whether the contract was void or simply unenforceable. In any event, the *Carper* and *Selph* cases have since declared the law to be that the Act of 1907 suspends or bars certain rights only in the state courts and does not make contracts entered into by noncomplying foreign corporation void or invalid.

The same is true of *Burroughs* v. *Southern Colonization Co.*, 96 Ind. App. 93; *Lowenmeyer* v. *National Lumber Co.*, 71 Ind. App. 458, and *Barnett* v. *Central Republic Bank and Trust Co.*, 100 Ind. App. 495 (see Pet. 22–23), which are intermediate appellate court decisions following the *Swing* case and not deciding the issue of the validity of the contracts.[2]

The court below quite properly chose to follow the latest state court decisions upon the construction of the Indiana statutes. Petitioner's charge (Pet. 13–14) that it refused to recognize and adopt local law is obviously wrong (see R. 123).

2. Petitioners contend that if recovery cannot be had in the state court, recovery cannot be had in the federal court (Pet. 28–30). But the latest expression of the Supreme Court of Indiana, in *Selph* v. *Illinois Pipe Line Co., supra* (approving *Peter & Burghard Stone Co.* v. *Carper, supra*) declares the contract valid and not void, while the *Carper* case reaches a similar conclusion and confines the operation of the statute to the Indiana courts on the very ground that such a contract is

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[2] *Swing* v. *Wellington*, 44 Ind. App. 455, and *Wiestling, Receiver*, v. *Warthin*, 1 Ind. App. 217, cited by petitioners (Pet. 16), also involved the Indiana Foreign Insurance Corporation Act of 1877, as amended, and, as the *Swing* case, are similarly limited in scope, although in the latter decision the court erroneously (see *Rehm* v. *The German Insurance and Savings Institution of Quincy*, 125 Ind. 135 (1890)) considered also several immaterial sections of the Indiana Foreign Corporation Act of 1852.

enforceable in the courts of any other state and in the federal courts. In allowing suit, the court below simply enforced the statute as construed by the state courts. No problem under *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, arises.

In *David Lupton's Sons* v. *Auto. Club of America,* 225 U. S. 489, arising under a New York statute similar to that of Indiana, and involving an issue parallel to that of the instant case, this Court held that a contract entered into by a noncomplying foreign corporation was enforceable in the federal courts.

In *Elston* v. *Piggott,* 94 Ind. 14 (1883), the Supreme Court of Indiana held that a foreign corporation which had not complied with the Indiana Foreign Corporation Act of 1852[3] but in whose favor a decree had been entered in the federal court was entitled to enforcement of the decree and was free to make a sale thereunder. Furthermore, the Indiana Supreme Court has also held that a cross-complaint to quiet title, filed by the mortgagor in a foreclosure suit which had been filed by a foreign corporation which had not complied with the Act of 1852, could not be maintained, since the notes and mortgage were not void. *Daly* v. *The National Life Ins. Co. of the United States of America,* 64 Ind. 1 (1878).

[3] Ind. R. S. 1881, § 3025. The statute is similar to § 9 of the Act of 1907, 2 Burns Annotated Indiana Statutes, 1926, § 4918.

3. Petitioners contend that the decision in *Barnett* v. *Central Republic Bank and Trust Co.*, 100 Ind. App. 495, is the "law of the case" in this suit (Pet. 30–32). In that case, however, the Indiana court did not discuss or decide the effect of the Indiana Foreign Corporation Act of 1907 outside of the Indiana courts, or even the validity of respondent's note and mortgage. The decision could not be binding here as the "law of the case," which is confined to questions actually decided, *Connett* v. *City of Jerseyville*, 110 F. (2d) 1015 (C. C. A. 7th), and is also confined to subsequent proceedings in the same case, *Fidelity & Deposit Co.* v. *Port of Seattle*, 106 F. (2d) 777 (C. C. A. 9th). *Wichita Co.* v. *City Bank*, 306 U. S. 103; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; and *Eppenauer* v. *Ohio Oil Co.*, 98 F. (2d) 524 (C. C. A. 5th) go no farther than to require that the federal courts pay the same respect as do the state courts to state court decisions in an earlier stage of the litigation between the parties or their privies. Since, as we have shown, the decision in *Barnett* v. *Central Republic Bank and Trust Co.* did not preclude suit on the note and mortgage in the federal courts, it was given full effect by the decision below.

4. Petitioners assert that, in consequence of the two prior dismissals of actions brought on this claim, the present action is barred by Rule 41 (a) (1) of the Federal Rules of Civil Procedure (Pet.

32–33). But both of the dismissals referred to (R. 86, 91) took place long prior to the effective date of the Rules. Rule 86, making the Rules applicable to *further* proceedings in pending actions, plainly does not reach back to make the earlier dismissals with prejudice. Cf. *Rader* v. *Baltimore & Ohio R. R. Co.*, 108 F. (2d) 980, 986 (C. C. A. 7th).

CONCLUSION

The court below correctly applied the Indiana law, and there is no conflict of decisions nor question of importance presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
CLAUDE E. HAMILTON, JR.,
General Counsel,
Reconstruction Finance Corporation.
C. J. DURR,
Assistant General Counsel,
LEE WALKER,
Agency Counsel,
HANS A. KLAGSBRUNN,
Counsel,
M. O. HOEL,
Attorney,
Reconstruction Finance Corporation.
JULY 1941.